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No. 81-1472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MERCK & CO., INC.,

Petitioner,

v.

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES,

and

UNITED STATES OF AMERICA

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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REPLY MEMORANDUM FOR THE PETITIONER [1]

1. The government contends that the statutory construction issue is "an important one with broad implications for the Comptroller General's ability to fulfill his statutory mandate." (Reply Mem. at 4). This assertion remains unsupported; the government still has failed to point to a single instance since these related cases arose in 1974 in which the GAO has been hindered in its ability to carry out a review project because of

[1] Merck's non-wholly-owned subsidiaries are listed in footnote 1 of the conditional cross-petition filed on February 5, 1982, as required by Rule 28.1. There have been no changes in that list.

the statutory interpretation on which three courts of appeals have agreed.[2] Furthermore, the last three courts of appeals to consider the issues raised in this and the related pharmaceutical cases all reached the same result, so that the circuit conflict asserted by the government is, in fact, more apparent than real. Accordingly, Merck urges the Court to deny the government's petition for certiorari in No. 81-1273 and to allow this eight-year conflict to come to an end.

2. If the government's own arguments for granting its petition in No. 81-1273 are accepted, however, they would warrant the granting of Merck's cross-petition as well. If the issues presented are truly broad-ranging and essential to the proper functioning of the GAO, then the questions raised in the conditional cross-petition also should be answered. There is substantial reason to conclude that the government's access-to-records authority does not extend to any cost records when the contract at issue is not cost-based. By denying the conditional cross-petition, the Court may foreclose itself from being able to reach that conclusion. The government should not be allowed to place blinders on the Court's view of the statutes and the pertinent legislative history.

3. The government is simply wrong in asserting that Merck "has pointed to nothing in the language of the statutes or their legislative history that would justify" the interpretation of the access-to-records statutes advanced by Merck and the other pharmaceutical companies. (Br. in Opp. at 3). The conditional cross-petition refers to the extensive legislative history supporting Merck's argument that Congress deliberately used the statutory language "directly pertains to" as a phrase of limitation, in order to restrict the scope of the Comptroller General's

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[2] *See Bristol Laboratories Division of Bristol-Myers Co. v. Staats*, 620 F.2d 17 (2d Cir. 1980), *aff'd by an equally divided court*, 451 U.S. 400 (1981); *SmithKline Corp. v. Staats*, 668 F.2d 201 (3rd Cir. 1981), *conditional petition for cert. before judgment denied*, 449 U.S. 1038 (1980); *Merck & Co., Inc. v. Staats*, 665 F.2d 1236 (D.C. Cir. 1981), *conditional petition for cert. before judgment denied*, 449 U.S. 1038 (1980).

authority to review the records of government contractors. *See generally* pages 11 to 15 of the cross-petition.[3]

The legislative history reenforces the plain meaning of the statutes and shows that Congress did not intend to authorize the GAO to use its audit powers to determine the abstract "reasonableness" of the prices paid under fixed-price contracts for standard commercial items sold to the government at—or, as here, below—the price paid by the general public. Two of the judges in the *Lilly* case (District Judge Holder and Circuit Judge Pell) found the full legislative history persuasive,[4] as did one of the subsequent criticisms of the Seventh Circuit's contrary conclusion.[5]

4. The government contends that Merck's construction of the access-to-records statute "is at odds with the administrative interpretation adopted by GAO, which is entitled to deference and which Congress, although aware of the agency's position, has never disapproved." (Br. in Opp. at 4). Accordingly, the government would have the Court ignore the merits of Merck's arguments.

The government's position, however, is not supported by the facts. The GAO's current interpretation of the access-to-records statutes is quite different from the GAO's contemporaneous construction of the statute and thus is not entitled to any deference. For example, during Congress' consideration of the statutes now at issue, the Acting Comptroller General provided an explanation of the bill to the House and Senate committees. That explanation cited a congressional floor debate explaining that the purpose of the statute was "to determine whether or not there is fraud or overreaching or

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[3] For a full discussion of the legislative history, see "Brief of Merck & Co., Inc. and SmithKline Corp., *Amici Curiae*," filed in *Staats v. Bristol Laboratories Division of Bristol-Myers Co.*, No. 80-264, 451 U.S. 400 (1981), at 12-19.

[4] *See Eli Lilly & Co. v. Staats*, 574 F.2d 904, 918-19 (7th Cir.) (Pell, J., dissenting), 919-26 (reprinting decision below), *cert. denied*, 439 U.S. 959 (1978).

[5] *See* Note, *Eli Lilly & Co. v. Staats: An Undue Expansion of the GAO's Investigatory Power Under the Access-to-Records Statutes*, 74 Nw. L. Rev. 122 (1979).

whether [the contractors] have done anything untoward." H.R. Rep. No. 791, 82d Cong., 1st Sess., at 4 (1951). At that time, GAO correctly understood that the access-to-records statutes were intended solely to grant the agency authority to examine records in order to deter or detect abuses in procurement. For a complete discussion of the point that the GAO's current interpretation is not entitled to deference, because it is neither consistent nor long-held, see "Brief of Merck & Co., Inc. and SmithKline Corp., *Amici Curiae*," *supra*, filed in *Staats v. Bristol Laboratories Division of Bristol-Myers Co.*, No. 80-264, 451 U.S. 400 (1981), at 19-23.

In this case, the Comptroller General explicitly has disavowed any suspicion of impropriety by Merck or the government contracting officers in the negotiation or performance of these contracts. If this Court decides to review this case, then the Court should consider the merits of Merck's arguments regarding the proper scope of the statute and should not automatically defer to GAO's latest shift in position.[6]

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[6] In support of its argument that what the GAO is seeking to do in the pharmaceutical industry is not a unique and unprecedented use of the access-to-record statutes, the government refers to other alleged instances of the use of these statutes to prepare reports on "the effectiveness of government procurement activities in particular industries." (Reply Mem. at 3 & n.3). In fact, the GAO acknowledged in the trial court that none of the reports involved examination of non-cost-based contracts in order to analyze procurement techniques in "particular industries."

(a) What the government identifies as a report on the "firearms industry" was simply the routine audit of cost information submitted by three contractors in connection with the negotiation of their cost-based contracts for a single weapon (the M-16 rifle) to determine whether costs had been overstated by the contractors. C.A. App. 484-85.

(b) The report on the "steel fabrication industry" involved audits of cost information submitted by a single contractor in connection with contracts for the bomb bodies for 250-pound and 500-pound bombs. C.A. App. 485.

(c) The report on the "steel plate (HY-80) industry" dealt with procurement of a single specialized type of steel plate used in the construction of nuclear submarines. The report focused on whether the supposed "catalog prices," relied upon by the Navy to exempt the contractor from submission of

(footnote continues)

5. Finally, the government attempts to side-step the question whether GAO's statutory access powers may properly be used to demand access to confidential corporate records for a purpose not authorized by Congress. The government's argument is: "No rule of law excuses a party from performing a contract because it does not approve of the other party's purpose in demanding performance . . . ." (Br. in Opp. at 10 n.5). This contention overlooks two basic facts. First, the GAO is a government agency created by Congress, and it has only those rights and prerogatives that Congress has seen fit to confer on it. Second, the access clauses in the contracts were included only because Congress required their insertion; they do not enlarge the GAO's powers beyond those that Congress intended to grant. Thus, the questions posed by Merck are integrally related to the question framed by the government: What is the proper scope of the GAO's access-to-records authority?

(footnote continued)

pricing information, had genuinely involved a standard commercial item sold in substantial quantities to the general public. The report concluded that there was no private commercial market for the products. C.A. App. 485. Merck has never denied the GAO's right to use the access statutes to determine whether the contracts in this case were properly found by the contracting officers to be exempt from submission of cost and pricing information.

(d) The report on the "petroleum storage industry" merely "evaluate[d] the relative economy to the Government of using new commercial storage facilities as [compared] to utilizing Government facilities for the storage of petroleum." C.A. App. 485. It was not an examination of cost records underlying non-cost-based contracts.

(e) The "aircraft tire industry" report consisted of a report on the General Services Administration's procedure for establishing the Federal Supply Schedule price for certain specialized military aircraft tires used by the Air Force and the Navy. C.A. App. 485. Once again, despite the implication in the government's brief, it was not a report that involved examination of cost records of non-cost-based contracts.

CONCLUSION

If review is granted in No. 81-1273, Merck's cross-petition also should be granted.

Respectfully submitted.

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